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OCCUPATION TAX ON C. O. D. LIQUOR SHIPMENTS.

In Texas a statute imposes "an occupation tax or license on persons, firms or corporations handling intoxicating liquors C. O. D." Its validity was challenged in a suit to recover from an express company what plaintiff had paid it on liquor shipped C. O. D. from Dallas, Tex., to consignees of liquors in various parts of the state for outgoing and return express charges. L. Craddock & Co. v. Wells-Fargo Express Company, 125 S. W. 59.

On the day the liquor was shipped from Dallas the statute imposing such tax was enacted, an emergency clause carrying it into immediate effect. The express company refused to deliver all packages except those on which defendant would release the C. O. D., and by direction of plaintiff, redelivered same to him at Dallas, enforcing its lien for carriage before turning same back to plaintiff.

Passing the question of the statute making the carrying out of its contract to deliver the goods unlawful, we call attention to what the court says about the contention that the statute is invalid, because of unreasonable classification under the Texas constitution.

It was claimed that this was "not a tax on the express business nor upon intoxicating liquors, but is a tax only on the C. O. D. feature of the carriage of intoxicating liquors, which is merely an incident to the business." Says the court: "We do not agree to this contention. The law imposes an occupation tax on persons, firms or corporations handling intoxicating liquors C. O. D. The tax is imposed on the delivering of liquors and collecting from the consignee the price of the same and returning it to the consignor. This is not a necessary part of the business of express companies. In our opinion it constitutes a business in itself, and is not, as appellant contends, simply an incident to the express business, which business paid an occupation tax when the statute of 1907 was adopted." The court then goes on to say that independently of that question the statute was valid under the state's police power, the court taking notice of the fact that local option was being habitually frustrated by jug shipments C. O. D. from points outside of local option territory.

We think few will doubt, that the statute is valid to the extent it was being enforced, whether the employment of the term C. O. D. serves to confine it to carriers or not—but possibly its validity could only be saved as an enactment under the state's police power. Would, however, it be held valid as respects the handling of C. O. D. liquor shipments sent from without the states?

The Adams Express Company cases against Kentucky (206 U. S. 129; 214 id. 218) appear to dispose of all claim of validity under the police power in a decidedly adverse way. The former of these two cases held invalid a statute making it an offense to deliver any C. O. D. shipment of liquor on the ground that it "is obviously an attempt to regulate interstate commerce." The second case was under a statute making it an offense to furnish, sell etc., liquor to any person who is an inebriate. The opinion in the latter case was very brief and based itself on the ruling in the former case.

But here is a new kind of question, and an opinion delivered by Justice Harlan on April 4th, 1910, in Southwestern Oil Co. v. Texas, not yet reported, may be thought to have some bearing thereon.

In the Oil Company case it was claimed that an occupation tax was void under the Fourteenth Amendment in making an arbitrary classification. The supreme court of the state was affirmed in upholding the tax and, in the opinion by Mr. Justice Harlan, the relation of such impositions to the Fourteenth Amendment was treated quite fully. Among other things, he said: "It was never contemplated, when the Amendment was adopted, to restrain or cripple the taxing power of the states, whatever the methods they devised for the purposes of taxation, unless those methods, by their necessary operation, were inconsistent with the fundamental principles embraced by the requirements of due process of law and the equal protection of the laws with respect to the rights of property." Therefore, it might be thought, that such a classification as is here attempted to be made would, if there is any fair reason therefor, be upheld, so far as the Fourteenth Amendment is concerned. It would be allowed, if a C. O. D. shipment or rather the additional duties involved therein constitute a transaction having no necessary relation to transportation.

It is undoubtedly true that states may do many things which affect interstate commerce, in an incidental way, which, not being covered by congressional enactment, are valid. It is unnecessary to attempt to enumerate these things, and no enumeration could be considered exhaustive.

If, as the Texas court says, the handling of C. O. D. shipments "constitutes a business in itself," it would seem that, at least until congress prescribed directly with regard thereto, the state could regulate the same and impose a tax thereon. We might also surmise, that if it is "a business in itself" only having a casual connection with interstate commerce, regulation might even be beyond congressional power.

But, even if it is an incidental thing connected with interstate commerce, a state would seem to have the right to regulate, and therefore to tax it, in the absence of action by congress directly affecting such an incident.

NOTES OF IMPORTANT DECISIONS.

EQUITABLE CONVERSION — DIRECTION BY WILL TO SELL AND DISTRIBUTE PROCEEDS OF LAND.—In the case of West Virginia Pulp Paper Co. v. Miller, 176 Fed. 284, decided by Fourth Circuit Court of Appeals, the contention was made that a legacy of the proceeds of the sale of land to a religious corporation was void, because of a limitation in the law of West Virginia as to amount of land which could be held by such a corporation. It was said that though the corporation beneficiary was a foreign corporation, such law was as valid against it as against a domestic corporation, on the principle that it can enforce its policy as to land within the territorial operation of the law.

But it was claimed that by the terms of the will there was worked out a conversion which changed the land into money and made this a gift of personalty.

It is certain that the doctrine of equitable conversion has been recognized in several of the states and a noted case (relied on by the opinion) in the federal Supreme Court, is that of Craig v. Leslie, 3 Wheat. 563. In this case it operated to the benefit of an alien, whose incapacity to take and hold beneficially a legal or equitable estate in real, but not personal, property was conceded.

No direct adjudication by West Virginia on the subject was instanced, but it was argued that "the evil sought to be remedied by the legislature of West Virginia was to prevent the holding of real estate in excess of the amount prescribed by law within its borders by a religious denomination. This is the only extent to which it could possibly go."

This last sentence we have our doubts about, especially when said in reference to wills, and we know there are statutes which limit the amount that can be desired or bequeathed by wills to charity. It is also perfectly familiar, that states can control the disposition of property by testator at his domicil.

We also would greatly doubt whether a devise to a trustee to sell and distribute proceeds of land would not be looked upon as a plain attempt to evade a statute, in any state where the doctrine of equitable conversion is not firmly established. Mere legal title in a naked trustee counts very little in American jurisprudence. Where an alien is cut out by a public policy creating his incapacity, it will scarcely be presumed that the courts where that policy obtains would be alert to assist him in not being debarred thereby by any cir-

cumlocution. As to a religious corporation construction might incline more to leniency.

Also, we may add that even where the equi table conversion is recognized, there exists strictness of application here and liberality there. The ordinary rule is that the direction to sell must be explicit and positive, but it has been held that a devise in trust with sale to be made upon request by a religious corporation with proceeds to establish an orphan asylum was held to be a bequest of money, though the asylum was to be under the control and direction of the corporation. Germain v. Baltes, 113 Ill. 39. So a devise of lands ordering, directing and authorizing executors to grant, bargain or lease the same, and dispose of proceeds effected a conversion of land into money. Forsyth v. Forsyth, 40 N. J. Eq. 400, 19 Atl. 119. As seemingly against this liberal application, see In re Bingham, 127 N. Y. 296, 27 N. E. 1035; Hudson v. Fuller, (Tenn. Ct. App.), 35 S. W. 575.

INSURANCE—CLAUSE PRORATING LOSS AMONG SEVERAL POLICIES AS CREATING SEPARATE CONTRACTS BY EACH.—The facts in the case of Scruggs & Echols v. American Cent. Ins. Co., 176 Fed. 224, decided by Fifth Circuit Court of Appeals show it was sought to enjoin a separate suit to collect from one of several insurance companies its proportionate part upon a loss under a clause that "this company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by insolvent in insolvent insurers, covering such property."

The court held that clause in each policy did not make the contracts "interdependent," but each was a "separate and independent" contract. Speaking as to the complaint in a suit to enjoin the action at law, the court said: "The complainant's liability would not be affected if all three of the other policies should turn out to be void; nor would it be affected by one or all of the three defendant companies becoming insolvent." Further it was said the result of suits against the other companies would be immaterial to it.

The further contention that equity would interpose because thereby a multiplicity of suits would be avoided, was not deemed tenable as complainant was only liable to one suit, and it was no concern of it whether the other companies were sued or not. Likewise that juries in other suits might place a different valuation on the loss was immaterial.

The insurer seems to have attempted with success to cut itself completely loose in its contracted obligation, and having succeeded it complains because all of the companies are not allowed to join their forces and pro rate the cost of fighting the insured.

These same questions were passed upon by the Eighth Circuit Court of Appeals in Mechanics Ins. Co. v. Distilling Co. 173 Fed. 888, and Hanover Fire Ins. Co. v. Brown, 77 Mo. 64, 25 Atl. 959, 39 Am. St. Rep. 386, where the ruling was the same. As contra on the ground of multiplicity of suits see Home Ins. Co. v. Chemical Co, 113 Fed. 1, 51 C. C. A. 21. See, also, Tisdale v. Ins. Co., 84 Miss. 709, 36 So. 568.

JURISDICTION—MOTION TO REMAND BY SUMMARY DISMISSAL OF CAUSE ALLEGED TO HAVE BEEN INSTITUTED IN CONTEMPT OF FEDERAL COURT.—The decision in the case of Cornue v. Ingersoll, 176 Fed. 194, rendered by First Circuit Court of Appeals, seems to us about the most illogical we have ever seen. The decision affirmed the circuit court's summary dismissal of the cause because it was "in contempt and evasion of law and in defiance of a final decree entered under the order of the United States Supreme Court."

This reads well enough as a general principle, but before a court undertakes to dismiss a case for any such reason it should first determine whether or not it has any jurisdiction to take such a step. If it has nothing to do with the case from the point of jurisdiction, it is railing by a court at the circumambient air.

The facts are, as claimed by the opinion, that a complainant brought suit in a state court, and upon the case being removed upon compliance with the statute, there was a motion to remand upon the ground that there was no diversity of citizenship. The federal court instead of confining its consideration to the motion, looks at the pleadings and finds therefrom that there was an attempt at a collateral attack upon the judgment of the federal court. On this it refuses to consider the motion to remand, speaking as follows: "Having found the proceedings to be in contempt and in evasion of the decision already made, we are not aware of any imperative rule of law which required the circuit court to lend potency to its existence by considering the question of diverse citizenship, or on motion of complainants, who held its decrees in contempt, to lend force to their offending purpose by remanding their case to the state court. If the requisite citizenship did not exist, as the complainants claimed, surely the order of dismissal violated no substantiative right."

Why does any court wish to make any pronouncement before it determines whether or not it will have any legal effect?

It was in vain that movant urged that a plea in bar was a plain remedy. The court said: "That is not the only remedy, and where the identity of the property is unmistakable, and the purpose to disestablish the result is clear, courts may not always subject parties to another trial upon a plea in bar, and to the expense and delay incident to such a defense." True again. But this is where a court with jurisdiction is acting. Nobody cares about what a court without jurisdiction thinks of the matter.

The movant also urged that "judicial invasion" was thus involved. The opinion speaks of the history of American courts being "not one of judicial invasion," and then demonstrates this by refusing to give the state court an opportunity to follow American precedent, by itself committing an act both of doubtful propriety and doubtful jurisdiction.

It really looks like the federal court was suspicious about the disposition of the state court, and was endeavoring to forestall an impartial consideration of complainants' rights therein in a question that could there be presented in an orderly way.

We think less heat and more calm might not be unprofitably sought for by the honorable occupants of the bench delivering itself of the decision above alluded to, and that finding the latter would scarcely make them derogate from their dignity.

NEGLIGENCE—INJURY CAUSED BY BARGAIN-COUNTER ANNOUNCEMENT IN A CROWDED STORE.—Evidently it is not within the judicial cognizance of the Supreme Judicial Court of Massachusetts that a headlong rush would be precipitated in a department store, filled with bargain-hunters, by a verbal announcement, to the crowd, of bargains at a jewelry counter.

In the case of Lord v. Sherer D. G. Co., 90 N. E. 1153, it appears that the management of a department store had by special advertisements drawn a large crowd of prospective customers. Into this seething mass an announcement was thrown of articles at a very low price at its jewelry counter. It acted as instantaneously as a cry of fire. Those on the upper floor rushed to and down the stairway, and plaintiff, a child under six years of age, was caused to fall down the steps and be injured.

The learned court said: "It has often been adjudged that a common carrier is held to the exercise of proper care to protect his passengers from injury by reason of jostling, pushing or other rough acts of a crowd which he allowed to collect in his cars, or upon his platforms, especially elevated platforms. * * * It cannot be said, however, that a merchant is negligent simply because he has his store crowded with customers, or because while the store is crowded he directs their attention to some part where they can get good bargains. That is what the store is for. * * * The stairs were of ordinary construction, and the defendant had the right to assume that under the circumstances there was no reason to anticipate any danger to those upon them."

There seems to us here a considerable grist of bad law. Here was a store designedly intending to bring a crowd to its counters and it is excused from looking after the safety of children in its swirling embrace, because "that is what the store is for." Then the court says: "The defendant had the right to assume" that people already inflamed by their cupidity or curiosity would do no harm when excited to a higher pitch. That was distinctly a jury question.

These department stores make of themselves, by the lures they hold out, public places as distinctly as are railroad platforms, and there are more dangers in them than on the latter. The invitation to be there is more pointed, and the hope of profit is more apparent. The Massachusetts court should refresh its recollection of things in the realm of judicial notice.

MASTER AND SERVANT—CONSTITUTIONALITY OF STATUTE REQUIRING EMPLOYER TO STATE TRUE CAUSE OF DISCHARGE.—We noted in 69 Cent. L. J. 219, the case of Atchison, T. &. S. F. R. Co. v. Brown, 80 Kan. 312, 102 Pac. 459, on this subject and commended the conclusion of the Kansas Supreme Court that a statute requiring an employer to furnish in writing to a discharged employee, upon his request, the true cause or reason for his discharge was unconstitutional. A late case from Texas Civil Court of Appeals holds a similar statute constitutional. St. Louis, S. W. Ry. Co. v. Hixon, 126 S. W. 338.

The opinion, to which there was no dissent, discusses the Brown case and that of Wallace v. Railway, 94 Ga. 732, 22 S. E. 579, both being opposed to the Texas ruling.

The reasoning whereby the Texas court seeks to justify its conclusion is not a very exalted kind—hardly, we might say, deserving place as a judicial utterance. We present it in its entirety.

"The decision in the Wallace case was rendered by the Supreme Court of Georgia in 1894, and the statute under consideration was entitled, 'An act to require certain corporations

to give to their discharged employees and agents the causes of their removal or discharge, when discharged or removed.' Acts 1890-91, p. 188. It authorized a recovery for $5,000 as a penalty for their failure to comply with the statute. No injury seems to have been alleged by the plaintiff, but the suit was brought to recover the penalty arbitrarily fixed by the statute. The decision in the case of Atchison, T. & S. F. Ry. Co. v. Brown, is by the Supreme Court of Kansas, and is based on the ruling in the Georgia case. It may be that the conditions existing in Texas at the time of the passage of the statute under consideration did not exist in Georgia at the time of the passage of the statute construed in the Wallace decision. The statute here under discussion was passed to meet and remedy an evil that had grown up in this state among railway and other corporations to control their employees. It seems that a custom had grown up among railway companies not to employ an applicant for a position until he gave the name of his last employer, and then write to such company for the cause of the applicant's discharge, if he was discharged, or his cause for leaving such former employer. If the information was not satisfactory to the proposed employer, he would refuse to employ the applicant. They could thus prevent the applicant, by failing to give a true reason for his discharge or blacklisting him, from procuring employment in either instance. Even if the statutes construed in the cases cited were in all respects similar to the statute before us, we would not be inclined to follow those decisions. It was to compel the former employer to state the true cause of its employee leaving its service, and, to prevent blacklisting, that brought about the passage of this statute. We have statutes in this state more exacting and drastic than the statute under discussion, which are being enforced daily, and no decision of the appellate courts is cited holding them unconstitutional."

We refer to reasons for our approval of the Kansas ruling to our former note, and here suggest that it seems to us, that what the Kansas opinion said as to police power of the state not excusing such an invasion of a personal constitutional privilege is not met by the recited conditions of which the Texas court takes judicial notice. If the custom referred was to a legal custom, its practice did not justify the statute.

If it amounted to a conspiracy, a discharged employee suffering therefrom, should base his action thereon. Or if a discharging employer acted unjustly, knowing the consequences under such custom, to an employee, that would be a tort. The unconstitutionality lies in the fact that a statute seeks to compel one not in court to furnish evidence to his adversary that he may exercise his opinion in using it against him or not.

LIABILITY OF OWNER OF IRRIGATION DITCH FOR DAMAGES ARISING FROM ITS CONSTRUCTION AND MAINTENANCE.

1. The owner of an irrigation ditch is not an insurer of his ditch against damages which may result from its operation.

2. The owner of an irrigation ditch, where his negligence or unskillfulness in constructing, maintaining or operating the ditch is sufficiently established, is liable in damages for the resulting injuries.

The principal difficulty to be found in analyzing cases which have been decided upon one or the other of the two propositions of law above stated, is in the failure to observe whether the damages asked for have resulted from intentional injury done by defendant by the direct application of force, or, whether the damages asked for, have resulted indirectly by reason of the defendant's negligence or blameworthy remissness or lack of care.

This difference is clearly set forth in the case of Fleming v. Lockwood.[1] Here damages were asked because water had seeped from defendant's ditch on to the lands of plaintiff, making them wet and marshy and destroying the hay growing thereon. Plaintiff asked the court to instruct the jury to the effect that, if plaintiff's lands were injured by seepage waters from defendant's ditch, then the verdict should be for the plaintiff without regard to the question of negligence on the part of the defendant in the construction or operation of the ditch. But, instead, the instruction given was to the effect that defendant was bound to use only ordinary care in the construction and maintenance of the ditch, and if he did exercise such degree of care, "then he would not be responsible for the damage

(1). Fleming v. Lockwood, 36 Mont. 384 (1907), 13 A. & E. Anno. Cases, 263, 10 C. L. 2016 and note 13.

complained of, through the seepage of water from his ditch, if you find from the evidence there was any such seepage." A verdict in favor of the defendant was rendered.

Says the court: "The plaintiff's theory of the case is illustrated by the instruction which the court was requested to give, as above set forth. (Substantially as above). The defendant's theory is illustrated by the instruction given by the court in lieu of that asked by the plaintiff. These different theories of the respective parties present the principal question for solution, and singularly enough, each of them is relying upon the former decision of this court to support his contention. Plaintiff relies upon Fitzpatrick v. Montgomery, 20 Mont. 181, 63 Am. St. Rep. 622, 50 Pac. 416, and Lincoln v. Rogers, 1 Mont. 217, and Nelson v. O'Neal, 1 Mont. 284, cited in the Fitzpatrick case; while repsondent relies upon Hopkins v. Butte, etc., Commercial Co., 13 Mont. 223, 40 Am. St. Rep. 438, 33 Pac. 817, and upon King v. Miles City Irrigating Ditch Co., 16 Mont. 463, 50 Am. St. Rep. 506, 41 Pac. 431. If appellant's theory is correct and the question of negligence does not enter into a case of this character, then every ditch-owner is an insurer of his ditch against damages therefrom to his neighbor, unless such damage is occasioned by an act of God or inevitable accident; and her counsel confidently rely upon the Fitzpatrick case above to support this contention."

In the Fitzpatrick v. Montgomery case above cited, the defendant was a placer miner conducting mining operations in a creek above Fitzpatrick's lands. He permitted the tailings and other debris to float down the creek, where they lodged on plaintiff's lands, causing the creek to cut a different channel and render the lands unfit for agriculture purposes.

"The decision of this court appears to have been rendered upon precedent rather than upon principle, and nearly every case cited in the opinion relies upon and applies the principle which counsel for plaintiff sought to have the trial court in this case embody in the offered instruction, namely: 'That every one must so use his property as not to injure that of his neighbor.' This principle of law finds expression in the maxim *Sic utere tuo ut alienum non laedas*, which our Civil Code in Sec. 4605, has translated as follows: 'One must so use his own rights as not to infringe upon the rights of another.'

"If the courts whose decisions are cited and relied upon in the Fitzpatrick case entertain the idea that this maxim is not applicable to negligence cases they are mistaken. While it is true that by adopting a code we have abolished common law forms of pleading, this abolition has not in any sense changed the fundamental rules of substantive law, and we must still resolve questions presented in our litigation with reference to those ancient rules of law which had reason, experience, and the necessity of society for their foundation.

"At the common law the Fitzpatrick case would have fallen into one of two classes of cases, trespass, or trespass on the case, the first of which might, or might not, involve a question of negligence, depending upon the particular circumstances, while negligence is the very gist of the latter.[2] Holmes on Common Law, 106. The maxim above was repeatedly applied in actions of trespass. It was likewise applied repeatedly in actions of trespass on the case. In Gerke v. California Steam Navigation Co., 9 Cal. 251, 70 Am. Dec. 650, the court said: 'The general rule upon this subject is laid down with great clearness by Cowen.' (Cowen's Treatise, 384). Speaking of action of trespass on the case, he says: 'It lies in all cases of negligence in the use and disposition of one's property, or in the clearing or improving it, by which another is injured; and the true question in such cases is whether the defendant or his servant has been guilty of negligence. For it is a maxim in law that a man is bound so to use his own as not to injure that which belongs to his neighbor.'[3]

(2). Foundations of Legal Liability, Vol. I, p. 74.

(3.) See note 4 Foundations of Legal Liability, Vol. I, p. 193.

"Since negligence is the very essence of an action of trespass on the case, and negligence was held not to enter into the Fitzpatrick case, we must assume that the case was treated as an action of trespass, and of that character of such an action which is maintainable without reference to the question of negligence; in other words the court must have held that Montgomery's situation was practically the same that it would have been had he hauled the debris in carts and deposited it upon Fitzpatrick's land, in which latter event, of course, the degree of care which he exercised would have been of no moment. This, at least, is the theory of most of the cases cited in this opinion in the Fitzpatrick case; and while it is a matter of doubt whether the Fitzpatrick case was of such a character, it was evidently treated as such, for upon no other possible theory can it be sustained.

"Familiar illustrations of the difference between an action in trespass, where negligence need not be alleged and proved, and an action of trespass on the case, which must be maintained, if at all, upon the theory of defendant's negligence, are these: If A strikes B with a log, B may maintain an action in trespass, and the question of negligence does not enter into the case at all. But if A places the log in a road, and B comes along and falls over it and injures himself, he may maintain an action on the case against A, by alleging and proving A's negligence. Dodson v. Mock, 20 N. C. 282, 32 Am. Dec. 677.[4] So, if A opens a head gate in his ditch and sends down water on B's land in such quantity as to cause injury, B could maintain an action in trespass; but if A's ditch gives way, precipitating water upon B's land, B's action will be on the case; and the reason for the rule in each of these classes of cases is apparent. An action of trespass presumes the active agency on the part of the wrongdoer in causing the injury, or, what is the same thing, the doing of the act wantonly or in total disregard of the other's right; while the action on the case assumes that the injury is consequential, or the direct injury is the result of negligence or nonfeasance. In other words, trespass implies wantonness, malice, or wilfullness, while trespass on the case implies only negligence."

In the Hopkins v. Butte, etc., Commercial Co. case (cited above), defendant had caused damage to plaintiff's land and crops by using a creek which ran past plaintiff's premises, in which to float down logs to the mills. The logs had formed a jam in the creek, causing an overflow of water on plaintiff's land, when the jam broke and damaging his crops, fences, etc. The court in this case said: "The gist of this action is negligence; and until some negligence is shown there cannot be said to be any liability."

In the King v. Miles City Irrigating Ditch Co. case (cited above), damages were asked by reason of break in defendant's ditch permitting the water therefrom to escape and injure plaintiff's lands. The trial court instructed the jury as follows: "In this connection the court further instructs the jury that it is incumbent upon the defendant company to construct its flumes and ditches in such a reasonable and prudent manner as that no damage shall result to the person whose lands are crossed by the ditch." This court on appeal said: "The instruction was clearly erroneous. The court undertook to lay down the measure of reasonable and prudent conduct on the part of the defendant. The court did not instruct that the care by the defendant should be either ordinary or extraordinary, but, on the other hand, instructed the jury that the degree of care should be such that no damage should result. The defendant was thus held, not only to the highest and most extraordinary degree of care, but was held to exercise such care that the plaintiff would not suffer any damage. In other words, the instruction made the defendant absolutely an insurer against all damages. It removed the question of negligence from the jury altogether, and practically instructed them that, if the damage occurred, the defendant was liable without regard to his negligence."

(4). Foundations of Legal Liability, Vol. III, p. 252.

No other case, on the particular subject involved in the above case, has come within the writer's inspection, but in Street's Foundations of Legal Liability, we find the matter treated from the beginning. Speaking of the early distinction between private wrongs done with and without force, the author says:[5] "Consideration of the difference between violent and non-violent injuries will in fact give a clearer perception of certain fundamental notions underlying the evolution of civil liability than can be gotten from any other view. The difference can perhaps be truly indicated as follows.

"In the field of trespass liability is based solely upon the fact that damage is directly done by force. No consideration is here taken of the moral qualities of the act which results in damage. The actor may or may not be culpable or morally blameworthy. He may or may not have intended to do the harm complained of. All discussion on this point is, as a matter of primary principle, entirely irrelevant. In the field of wrongs not characterized by a display of force, it is different. Here the law does not impose liability unless the injurious act or omission complained of exhibits in some form the element of blameworthiness. Fraud, malice, negligence, will occur to the reader as forms of blame which, in one connection or another, are accepted as a basis of liability.

"The moral ingredient thus appears to be negligible in wrongs of direct violence, while in other torts it is of prime importance. The internal development of the law of tort is largely a result of the display of these two ideas of absolute liability and of liability conditioned upon some form of fault or actual moral delinquency. The first idea is harsh. Hence as the law becomes humanized and as the legal mind becomes educated to realize the truth that the fault of the actor is a factor which has a rightful place in determining liability, the theory of trespass is ameliorated."

Again this author says, speaking of the old view held in cases of the seventeenth and eighteenth centuries:[6] "Notwithstanding these authorities the proposition that a man is liable in trespass for all direct harm accidentally done by him in the immediate performance of a lawful act is untenable; and a milder doctrine is now accepted that defendant in trespass can always excuse himself by showing that the injury complained of was purely accidental and that it happened without any fault of his. Some degree of negligence or blame must be imputable to the defendant or he cannot be held."

Again:[7] "We now proceed to consider the relation between the conception of negligence and liability in the field of trespass. The proposition on which attention is here to be focused is this: For intentional injury done by the direct application of force a man is absolutely liable. For injury done by the direct application of force under such circumstances that the law can ascribe to the actor an intention to do harm, he is also absolutely liable. But where actual intention is absent and the circumstances are such that the law will not raise a presumption of intention against the actor, here liability cannot exist, unless negligence, in the sense of some degree of blameworthy remissness or lack of care, on the part of the actor is shown. In other words, negligence is essential to liability for unintentional injury, and it is good defense in an action of trespass for unintended harm for the defendant to show that he was in no way negligent or to blame in doing the act which proximately caused the damage."

Standard of Care: On this subject Mr. Street writes:[8] "The legal test of negligence, whether negligence be conceived as a sort of legal or moral delinquency or whether it be conceived as a breach of implied duty, is this: Did the defendant in doing the alleged negligent act use that reasonable care and caution which an ordi-

(5). Foundations of Legal Liability, Vol. I, p. 2.

(6). Foundations of Legal Liability, Vol. I, p. 79.

(7). Foundations of Legal Liability, Vol. I, p. 73.

(8). Foundations of Legal Liability, Vol. I, p. 96.

nary prudent person would have used in the same situation? If not he is guilty of negligence. Stated in another way, conduct is said to be negligent when a prudent man in the position of the tort feasor would have foreseen that a harmful effect was sufficiently probable to warrant his foregoing the conduct or guarding against its consequences."

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ACCORD AND SATISFACTION—PART PAYMENT.

PARKER v. MAYES.

Supreme Court of South Carolina, April 1, 1910.

Payment of a sum smaller than a liquidated debt, pursuant to a simple contract to accept such sum in satisfaction of the whole debt, only operates as payment pro tanto, notwithstanding the agreement.

JONES, C. J.: This is a suit upon a promissory note dated February 29, 1904, signed by the defendants, who jointly and severally promised to pay to the order of S. C. Cook $1,200 sixty days after date. Cook indorsed and delivered the note to S. M. French before maturity, but, as matter of fact, the note was taken for property belonging to French and sold by Cook as his agent and French was real owner of the note when it was executed. French became bankrupt, and plaintiff became owner and possessor of the note as trustee in bankruptcy. The defendant Anderson was not served, and judgment was not demanded against him. Upon the trial Judge Dantzler directed a verdict against defendant Mayes for $847.38.

Upon a previous motion Judge Shipp made order striking out from defendant's answer after the word "herein" on second line down to and including "payment" on last line of the following which constitutes the second defense: "(1) That he admits that he signed the note, as set out in the complaint herein, (but alleges that it was understood and agreed by all parties at the time that he signed it that he was liable for one-half thereof only, and that this defendant is informed and believes and alleges that S. M. French, the party to whom the note was transferred by S. C. Cook, was advised of and fully knew all these facts when he acquired the aforesaid note. (2) That, when the said S. M. French caused the said note to be presented to this defendant for payment, this defendant denied liability for any amount of the said note save and except one-half thereof, and advised the aforesaid S. M. French that he would resist payment, if necessary, by litigation, whereupon said French agreed with this defendant that, if he would pay the one-half thereof, said amount would be accepted in full of all this defendant's liability thereon, and he would be released from all further liability thereon; whereupon, and in consideration of this agreement and understanding between this defendant and the said S. M. French, this defendant paid to the order of the said S. M. French the one-half of the said note. That the said amount was accepted with this understanding and with a memorandum of the same made on the check that this defendant gave in payment.)" In appealing from the judgment on verdict appellant assigns error to the order of Judge Shipp.

Even if we should waive the point that appellant should have appealed from the order of Judge Shipp, there was no error. The allegation as to the contemporaneous agreement was in conflict with the well-established and salutary rule which forbids parol testimony to vary or contradict the terms of a written instrument. The note was both joint and several, "we or either of us promise to pay," and the alleged agreement was to the contrary. Parol evidence of a contemporaneous, collateral, or independent agreement is only admissible when it does not vary or contradict the writing. Chemical Co. v. Moore, 61 S. C. 166, 39 S. E. 346; Ashe v. Railroad Co., 65 S. C. 138, 43 S. E. 393; Earle v. Owings, 72 S. C. 364, 51 S. E. 980; Clarke v. Insurance Co., 79 S. C. 499, 61 S. E. 80. The subsequent agreement alleged could not avail defendant. As declared in Ex parte Zeigler, 83 S. C. 80, 64 S. E. 513, 21 L. R. A. (N. S.) 1005, the rule derived from Pinnel's Case, Coke, v, 117, is enforced in this state. "The payment of a sum smaller than a liquidated debt in pursuance of an agreement, not under seal, to accept such sum in satisfaction, cannot be satisfaction of the whole. Such payment notwithstanding the agreement operates only as a payment pro tanto." After this, and before trial, motion was made before Judge Dantzler to amend the answer so as to allege that defendant "has paid in full all his liability on the note described in the complaint and that he is fully discharged from all further liability or responsibility on account of the

said note by reason of said payment," which motion was refused and exception is now taken to such refusal. "Such motions are addressed to the discretion of the circuit judge, and his action is not subject to review by this court, unless there has been an abuse of discretion." Clerks' Union v. Knights, etc., 70 S. C. 550, 50 S. E. 206. We see no abuse of discretion in this case.

There is nothing in the record to show that it was made to appear to the court that the amendment sought to plead payment otherwise than as attempted in the matter previously stricken out. Moreover, since the complaint alleged credits and that there was a specified balance due, defendant could have shown other payments under the general denial. McElwee v. Hutchison, 10 S. C. 436.

The foregoing conclusions control the remaining exceptions to the exclusion of testimony, for the excluded testimony merely related to the alleged defense stricken out by the order of Judge Shipp.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

NOTE—*The Strictness of the Rule of Acceptance of Smaller for Larger Sum Not Being Satisfaction.*—It is undoubted that the debt to which the rule applies is one that is liquidated—there must exist no *bona fide* dispute as to the amount. We consider it unnecessary to cite authority for this proposition. Chief Justice Fuller, in Chicago, Milwaukee, etc., Ry. Co. v. Clark, 178 U. S. 353, 364, said even to this, however: "The rule has been much questioned and qualified," and: "The result of modern authorities is that the rule only applied when the larger sum is liquidated, and when there is no consideration whatever for the surrender of part of it; and while the general rule must be regarded as well settled, it is to be considered so far with disfavor as to be confined strictly to cases within it."

If one pays in advance a less sum than is due there is consideration for accord and satisfaction. Weiss v. Marks, 206 Pa. 513, 56 Pa. 50; Baldwin v. Daly, 41 Wash. 416, 83 Pac. 724. If there is a claim of set-off this takes the transaction out of the rule. Pohlmann Coal v. St. Louis, 145 Mo. 651; Ostrander v. Scott, 161 Ill. 345; Farmer v. Merrill, 108 Mich. 61. "Courts are prone to uphold, when possible, an agreement by which a creditor accepted less than was due in satisfaction of a demand, instead of defeating the agreement for want of a consideration; and a very slight consideration will be held sufficient." Tucker v. Dolan, 109 Mo. App. 442, 456. See also Rotan Grocery Co. v. Noble, 36 Tex. Civ, App.. 226, 81 S. W. 586.

Where judgment debtor was insolvent and contemplated resorting to bankruptcy, his creditor's acceptance of lesser amount was held to bind to an agreement of satisfaction. Hanson v. McCann, 20 Colo. App.. 43, 76 Pac. 983. In this case "there was no formal agreement, but the appellant (creditor) was advised that a resort to bankruptcy was contemplated by the appellee and to insure himself of a sum certain rather than run the risk of being compelled to take a smaller sum, or losing his whole claim, he entered into the agreement of compromise. The contract is, therefore, supported by good and valid consideration." The opinion cites Dawson v. Beall, 64 Ga. 328; Hinckley v. Arey, 27 Me. 362. Here it is perceived it was allowed to go outside of the terms of the agreement and prove the surrounding circumstancs to validate the agreement.

In Engbretson v. Seiberling, 122 Iowa 522, 98 N. W. 319, 64 L. R. A. 75, 101 Am. St. Rep. 279, it was said: "The sole question for our consideration is whether the acceptance from an insolvent debtor of part payment in full satisfaction of a claim is founded upon such consideration that the entire debt is thereby discharged." Then the court, admitting that this exact question had not before been squarely presented, said that prior Iowa decisions "certainly indicate a predisposition to regard the insolvency of the debtor as a matter which might be considered in determining the validity of an agreement to accept part payment in full discharge." Then the court holds in the affirmative of the above question, and cites numerous cases to same effect. If the payment is made out of a particular fund belonging to the insolvent, which can only be reached by the creditor in accordance with the agreement this accomplishes satisfaction. Dalrymple v. Craig, 149 Mo. 345, 50 S. W. 884. *Semble* Shelton v. Jackson, 20 Tex. Civ. App. 443, 49 S. W. 415.

In Lincoln Sav. Bank, etc. Co. v. Allen, 82 Fed. 148, 27 C. C. A. 87, in an opinion by Sanborn, C. J., Eighth Circuit Court of Appeals, held that an agreement to accept cash and certain of several collateral notes held by the creditor and surrender to the debtor of the others, in full satisfaction, was valid though the cash and face of the notes given the creditor did not equal the debt. The court said: "There is sufficient consideration to support the contract in the fact that it relieves the creditor of the expense and trouble of a sale of the collaterals under the pledge and converts them at once into money applicable to the payment of the debt."

In Indiana it was held that acceptance of the note of a third party for a less sum operated, under agreement, to extinguish the debt. Wipperman v. Hardy, 17 Ind. App. 142, 46 N. E. 537. And so of the debtor's note indorsed by a third person. Fred v. Fred (N. J. Eq.), 50 Atl. 776. *Contra* as to note of third person of less amount, Mannakee v. McCloskey, 23 Ky. Law Rep. 515, 63 S. W. 482.

Judge Sanborn later treated the question of accord and satisfaction in a case, where articles of less value than an amount due were surrendered in satisfaction of the debt. Missouri Am. Elec. Co. v. Hamilton-Brown Shoe Co., 165 Fed. 983, 91 C. C. A. 251. In reply to counsel invoking the rule that there was no satisfaction in accepting part of a sum for the whole the opinion said: "The rule invoked is indisputable, but it applies only when part payment is made in the same medium called for by the obligation, as in money if money is due, in corn if corn is due, by the terms of the agreement. Where articles other than those for which a contract provides are paid and received in satisfaction of it, they constitute a sufficient consideration for its dis-

charge, although they are of much less value than that due, and this because the legal presumption obtains that they had a special value to the recipient. Such a transaction is necessarily an accord and satisfaction, and a release of an obligation founded upon it is valid." Thereupon are cited the following cases: Very v. Levy, 54 U. S. 345, 359; City of San Juan v. St. John's Gas Co., 195 U. S. 510; Neal v. Handley, 116 Ill. 418, 6 N. E. 45, 56 Am. Rep. 784; Dimmisek v. Sexton, 125 Pa. 334; Bull v. Bull, 43 Conn. 455. It would seem that confining the rule to payments in the same medium receives a very technical application when articles of a fixed market value are offered because they could not be presumed to have "a special value to the recipient." No one cares for a particular bushel of wheat and it is bought or sold according to grade. As, however, the rule itself is, as said, "in disfavor," exceptions even technical are admissible to displace it.

In one or two states statutes have displaced the rule as to which we have been instancing exceptions. It is a harsh rule argued against in a general way by many courts, but it is distinctly recognized as witness especially the many cases, not attempted here to be cited, of checks being sent with condition written thereon of payment in full.

The rule applies to part payment of a judgment, of course, but it has been held, that if a judgment may be appealed from, and appeal proceedings are abandoned in consideration of agreement to accept a less for a larger sum in full satisfaction, such agreement is enforceable. Roberts v. Bause (N. J. L.), 72 Atl. 452.

C.

JETSAM AND FLOTSAM.

RE FEDERAL TAX ON INCOME OF CORPORATIONS.

Corporations are persons within the meaning of the fourteenth amendment to the Constitution of the United States.

Certain corporations, like national banks, the Pacific railroad companies, and post roads, have been created under power of congress, to coin money, to establish post-roads and roads for the conveyance of munitions of war.

All other corporations are created under the laws of the various states of the Union.

"The power to tax involves the power to destroy."

"The power to tax all property, business and persons within their respective limits is originally in the states and has never been surrendered" to the federal government.

I believe the law is unconstitutional and void for the following reasons:

First: Because the law goes to the life of the corporation. The tax imposed is, strictly speaking, a franchise tax. If the reports required are not made or if the tax is not paid the further existence of the corporation is terminated.

(a) Such a tax may be levied by the federal government upon a corporation which it creates, viz., national banks, the Pacific railroads, post-roads, etc.

(b) But cannot be levied upon corporations created by the state and from which the state derives its revenue for governmental purposes.

Second: Because the tax is a tax upon an artificial being created by the state, recognized as a person under the law, and is a direct tax upon it, and is unconstitutional and void as an excise tax. It does not come under the provision of the constitution providing for direct taxation, which is as follows: That "no capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed."

Third: The tax is void because it is not uniform as a duty, impost or excise tax, as provided in paragraph 1, section 8, article 1, of the constitution, which is as follows: "All duties, imposts and excises shall be uniform throughout the United States."

(a) Because it exempts corporations with a net income of less than $5,000 and therefore exempts the commodity manufactured or produced by such corporations from the burden of the tax.

(b) Because the tax is a burden upon the commodity or income of a corporation, and no like tax is imposed upon the commodity or income of an individual or co-partnership.

(c) Because it permits the corporation which pays rental to deduct the amount paid for rentals and does not permit the corporation owning its own plant to deduct a like amount for the use of its plant, and therefore shows it to be a direct tax on real estate or the income thereof.

(d) Because it permits the corporation to deduct "all amounts received by it within the year as dividends upon stock of other corporations . . . subject to the tax hereby imposed," therefore permitting a parent or holding corporation to hold the stocks of several corporations, each of whose incomes is less than $5,000 a year, but the aggregate income of the parent or holding corporation might exceed many times $5,000 and it would be exempt from the tax.

Fourth: The tax is void because it is levied upon the gross income less certain specified deductions. The attorney general has said that it is not a tax upon the profits but upon the entire net income over and above $5,000 received from all sources during the year, and defines the income which is to be reported in the returns to be "actual receipts and payments." This income, therefore, necessarily includes the income from real estate and the income from the use of personal property, which it has been held cannot be taxed.

Fifth: The act as construed by the commissioner of internal revenue is unconstitutional and void because it imposes a tax upon the gross profits of the corporation less the specific deductions provided by law. It is a direct tax upon the income of real estate and is therefore a tax upon real estate. It is a tax on the income derived from the use of personal property and is therefore a tax upon the personalty which, it has been held, cannot be taxed in this manner.

Sixth: When a corporation received its charter from the state of its creation, that charter is a contract between the state and the corporate body. The state cannot forfeit that charter except for abuse of the laws of the state by the corporation, which laws are by implication a part of the charter. This protection is given to the corporation by the federal constitution, which provides that no state shall pass any law impairing the obligation of contracts. The fed-

eral constitution does not grant to congress any power to pass any law to impair or destroy a contract entered into between the state and the corporate body.

Seventh: Under the federal constitution without any legislative enactment the federal courts have denied to the state the right to lay any discriminating burden or tax, however small, upon interstate commerce. The states have been denied by the federal courts the right to levy any franchise tax or corporation tax upon corporations created by the federal government. The states have never surrendered to the federal government the power to tax "all property, business and persons within their respective limits." The federal government therefore has no power to directly tax an artificial being created by the state in the manner adopted in the present act.

Eighth: I believe a state has power ordinarily to tax property for the current year by an act not passed nor approved until after the beginning of the year. A state may enact a law after the beginning of a year imposing a franchise tax upon corporations doing business in the state for the whole calendar year, and that it would not be an ex post facto law, if that tax is not based upon the income or profits of the corporation. But an act like the present one, imposing a tax upon the income of a corporation, as defined by the attorney general, or upon the profits of a corporation, as defined by the commissioner of internal revenue, which tax really takes effect at a time several months antedating the passage and approval of the act, is a burden upon transactions which are closed; is a burden upon transactions made prior to the act and which may be executory. It therefore impairs the obligation of those transactions to the extent of the tax, as there is no power delegated to congress, express or implied, to warrant it in enacting a law impairing the obligaated by the federal government. The states tion of contracts, and as the federal constitution particularly prohibits the states from passing such a law. I therefore believe that the law is unconstitutional and void.—National Corporation Reporter.

SPECIFIC PERFORMANCE TO CONVEY ,ON WIFE'S REFUSAL TO JOIN IN DEED.

ADDENDUM TO ANNOTATION.

In our annotation to Maas v. Morganthaler, 70 Cent. L. J. 283, we inadvertently overlooked a late Missouri case, among those opposed to the principal case. and, as there is by the prevailing and dissenting opinions a very full discussion, with the elaborate citation of authority from other states, of the important question considered, we call special attention to it. Aiple-Hemmelman R. E. Co. v. Spelbrink, 211 Mo. 671, 111 S. W, 480,

The court was divided upon this question, the prevailing opinion reversing the lower court being by a majority of four to three. Judge Lamm speaking for the minority, says, "The conclusion reached seems contrary to the directions sent down in Kilpatrick v. Wiley, 197 Mo. l. c. 172-3," and then quotes such directions, to the effect that, on the wives of plaintiffs refusing to join in the conveyance, the present worth of their dower interests be ascertained and deducted. The majority opinion admits the contrary ruling as an abstract proposition of law, but says that there was no such question in that appeal." But whether there was or not, it is certain that the ruling had a concrete effect. It appears to this annotator that the reasoning for an exception advocated by the majority in the Missouri case is well based and consonant with good policy in respect to the marital relation, but a great array of authority in this country, opposed to such exception, makes it appear somewhat inapt the majority opinons expression of surprise at this view beoing taken.

We express our thanks to one of our correspondents for calling attention to the Spelbrink case. C.

BOOK REVIEWS.

BELL ON PRINCIPLES OF ARGUMENT.

This book, in one volume, octavo size, in cloth, of 330 pages, is a very creditable production. It submits practical suggestions as to theory of argumentation towards the end of producing conviction, and illustrates the text with excerpts from works on logic, speeches and addresses in a forceful way. The various methods of reasoning are shown, and the effort of the author to apply practically the rules which are found in writings more metaphysical or philosophical in character, is very successful. We appreciate the task set by the author for himself was not an easy one, and his appreciation of this has made him give that respect to logic as a science to which it is entitled. It will certainly benefit any lawyer to study this book—it will above all things make him quick to detect fallacies in his opponent's argument as well as resourceful in pressing his own.

The table of contents evidents the wide and thorough range of the author's discussion. Chap. I., Inference and Argumentation; Chap. II., Proof; Chap. III., Classification of Arguments; Chap. IV., Arguments from Experience; Chap. V., Arguments from Authority; Chap. VI., Deductive and Inductive Arguments; Chap. VII., Conditional and Unconditional Arguments; Chap. VIII., Direct and Indirect Arguments; Chap. IX., Disproof; Chap. X., Refutation; Chap. XI., Arrangement of Arguments; Chap. XII., Some Hints on Debating.

The style of the author is clear, his subject well divided and the subdivisions in orderly procession toward the end aimed at. The author is Mr. Edwin Bell, LL. B., and the book is from the presses of Canada Law Book Company, Ltd., Toronto, and Cromarty Law Book Company, Philadelphia, 1910.

HUMOR OF THE LAW.

"Have you," asked the judge of a recently convicted man, "anything to offer the court before sentence is passed?"

"No, your Honor," replied the prisoner, "my lawyer took my last cent."—Stray Stories.

"Now, Pat," said a magistrate to an old offender, "what brought you here again?"

"Two policemin, sor," was the laconic reply.

"Drunk, I suppose," queried the magistrate.

"Yes, sor," said Pat, "both av thim."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Aliens**—Naturalization.—The federal government in authorizing state courts to act in naturalization proceedings selects such courts and the clerks thereof as government agencies, through whom the government is discharging a function of sovereignty.—Eldredge v. Salt Lake County, Utah, 106 Pac, 939.

2. **Attachment**—Motion for Discharge.—A motion for immediate discharge of property seized in attachment proceedings, when claimed by another, who interpleaded, if a substantial question as to ownership between defendant and interpleader arose, should be overruled.—Western Grocer Co. v. Alleman, Kan., 106 Pac. 997.

3. **Bail**—Custody of the Law.—One charged with crime, and at large on bail, held constructively in the custody of the law, for he is in the custody of his bondsmen, who are his jailors.—Netograph Mfg. Co. v. Scrugham, N. Y., 90 N. E. 962.

4. **Bankruptcy**—Adjudication.—From a bankrupt's adjudication until the appointment of a trustee the bankrupt is not to be regarded as civilly dead.—Plaut v. Gorham Mfg. Co., U. S. D. C., S. D. N. Y., 174 Fed. 852.

5.——Conditional Sales.—A trustee in bankruptcy has no greater title to the bankrupt's property sold to him under a conditional contract sale than the bankrupt had.—John Deere Plow Co. v. Anderson, U. S. C. C. of App., Fifth Circuit, 174 Fed. 815.

6.——Grounds for Refusal of Discharge.—In order to be "false" so as to bar a discharge, the representations made by a bankrupt to obtain credit must have been willfully or intentionally misleading.—In re Kyte, U. S. D. C., M. D. Pa., 174 Fed. 867.

7.——Jurisdiction of Federal Court.—A federal court held without jurisdiction of a suit by a bankrupt's trustee to establish an expired lease as an asset of the bankrupt's estate.—Plaut v. Gorham Mfg. Co., U. S. D. C., S. D. N. Y., 174 Fed. 852.

8.——Lien for Rent to Become Due.—Where the landlord of a bankrupt had a lien on the property on the leased premises for "rent due and to become due" by the express terms of the lease and also by Sayles' Tex. Ann. Civ. St. 1897, art. 3251, for rent due and to become due for the current contract year, such lien is enforceable against the trustee in bankruptcy for rent to become due during the remainder of the contract year in which the bankruptcy occurs, and which has become due prior to the adjudication of the claim.—Martin v. Orgain, U. S. C. C. of App., Fifth Circuit, 174 Fed. 772.

9.——Partnership.—Adjudication of a partner as a bankrupt authorizes the bankruptcy court to compel the transfer of the individual property of the partnership to the trustee by summary order.—In re Lattimer, U. S. D. C, E. D. Pa., 174 Fed. 824.

10.——Rights of Creditors.—Creditors are generally entitled to access to testimony taken by the referee while it remains in his custody.—In re Samuelsohn, U. S. D. C., N. D. N. Y., 174 Fed. 911.

11.——Set-Off Against Bankrupt After Discharge.—A court of equity will compel the assignee of a bankrupt to allow as a set-off a claim against the bankrupt, where injustice would otherwise result, though an action at law could not then be maintained.—Wyckoff v. Williams, 121 N. Y. Supp. 189.

12. **Banks and Banking**—Deposits.—Money paid into a bank after the death of the person entitled thereto, held not available to pay an obligation which the bank held against his estate.—Padgett v. Bank of Mountain View, Mo., 125 S. W. 219.

13.——Representation by Officers.—A bank which has intrusted the conduct of its affairs to its president, such conduct being within the range of the authority customarily given to such an officer, is bound to one who has parted with his money in good faith in reliance upon the authority so exercised, whatever may be

the limitations which the by-laws or resolutions of the board of directors in fact place upon it of which he has no knowledge.—Citizens' Bank & Trust Co. v. Thornton, U. S. C. C. of App., Fifth Circuit, 174 Fed. 752.

14. **Benefit Societies**—Assessment Rate.—A complaint in an action against an insurance organization held to state a cause of action for breach of a contract in raising its alleged fixed assessment rate.—Jones v. Supreme Court of Independent Order of Foresters, Wis., 124 N. W. 1027.

15. **Bills and Notes**—Assignment or Sale.—The maxim caveat emptor applies as well to purchasers of negotiable paper as to the purchaser of any other species of property.—Bank of Ozark v. Hanks, Mo., 125 S. W. 221.

16.——Statutes.—Under the statute, where the payee of a note has indorsed it to another and guaranteed its payment, the holder may sue the maker and the payee jointly.—Taney County Bank v. Bray, Mo., 125 S. W. 235.

17. **Boundaries**—Calls of Quantity.—A call for quantity in a deed held required to yield to the call of the field notes for the location of the boundary lines.—Pratt v. Townsend, Tex., 125 S. W. 111.

18.——Waters and Water Courses.—Where a party owns land on the bank of a navigable stream, his rights in the stream are bounded by the center line or thread of the stream, and lines run from the points where the boundaries of his land reach the stream to the center line of the stream, at such a point as to form right angles therewith.—Farris v. Bentley, Wis., 124 N. W. 1003.

19. **Brokers**—Revocation of Authority.—A broker's agency is revoked by the principal's disposition of his interest in the subject matter.—Frazier v. Cox, Ky., 125 S. W. 148.

20. **Carriers**—Rebates.—Where an express company refuses to carry liquor C. O. D., and plaintiff paid the return charges on packages not accepted, it would have been unlawful for the carrier to rebate these charges.—L. Craddock & Co. v. Wells-Fargo Company Express, Tex., 125 S. W. 59.

21. **Chattel Mortgages**—Sale of Property by Mortgagor.—Chattel mortgage, where the mortgagor by agreement was authorized to sell the mortgaged property and apply the proceeds to his own use, held void as to creditors.—Citizens' State Bank of Tracy v. Brown, Minn., 124 N. W. 990.

22.——Validity as to Creditors.—Chattel mortgage, where the mortgagor by agreement was authorized to sell the mortgaged property and apply the proceeds to his own use, held void as to creditors.—Citizens' State Bank of Tracy v. Brown, Minn., 124 N. W. 990.

23. **Clerks of Courts**—Compensation.—The principle that the incumbent of a public office must discharge the duties thereof for the compensation fixed by law held not to prevent the clerk of a state district court performing services in naturalization proceedings, from retaining the fees as therein provided.—Eldredge v. Salt Lake County, Utah, 106 Pac 939.

24. **Commerce**—License Tax.—Foreign sleeping car company cannot be restrained from doing local business in the state on its refusal to pay charter fee imposed by Gen. St. Kan. 1901, sec. 1264; such requirement amounting to a burden on interstate business and on property used outside of the state.—Pullman Co. v. State of Kansas, U. S. S. C., 30 Sup. Ct. 232.

25. **Constitutional Law**—Residence in State.—Held, that the constitutionality of the exceptions contained in Sess. Laws 1907, c. 132, secs. 3, 4, relative to the residence required of plaintiff in divorce, cannot be questioned by a person who does not fall within either of them, but who, under section 1, must reside in the state one year and the county three months.—Pugh v. Pugh, S. D, 124 N. W. 959.

26. **Contracts**—Validity.—A power of attorney to an agent having a contract to sell certain articles, to appoint other managing agents on the same terms, and furnish them with similar contracts and power to appoint yet other managing agents in an endless chain, was void, as contrary to public policy.—Bank of Ozark v. Hanks, Mo., 125 S. W. 221.

27. **Corporations**—Counties.—A creation of an unorganized county held a legislative, and the organization of a county an administrative, function.—Board of Com'rs of Big Horn County v. Woods, Wyo., 106 Pac. 923.

28.——Dissolution.—A judge of a circuit court has no jurisdiction in an equitable proceeding to dissolve a corporation where there is no statute conferring that jurisdiction upon the court.—State v. Foster, Mo., 125 S. W. 184.

29.——Insolvency—A sale of assets of an insolvent corporation to one of their number, approved by the stockholders held not void, but voidable, if unfair.—Roberts v. Herzog, Minn., 124 N. W. 997.

30.——Officers.—Even if a minor is disqualified from being a director in a Massachusetts corporation, that a director of a corporation was a minor would not prevent the transfer to the corporation of the good will of a business.—Myott v. Greer, Mass., 90 N. E. 895.

31.——Right of Stockholders to Inspect Books.—A stockholder of a corporation may properly demand an inspection of the books, for the purpose of prosecuting his claim against the corporation.—State v. Monida & Yellowstone Stage Co., Minn., 124 N. W. 971.

32. **Costs**—Cost of Printing Abstract.—The cost of printing the part of appellee's abstract which was unnecessary to determine the questions involved held not taxable against appel-

lant on affirmance.—Bonnewell v. Lowe, Kan., 106 Pac. 1002.

33. **Courts**—Diverse Citizenship.—A suit may be brought in the federal courts by the holder of a note payable to bearer against the maker where their citizenship is diverse, though the maker and the payee were citizens of the same state.—State Nat. Bank of Denison v. Eureka Springs Water Co., U. S. C. C., 174 Fed. 739.

34.——Error to State Court.—The construction of a prior decree of a state court and whether it bound parties subsequently coming in does not present any question which will sustain a writ of error from the federal Supreme Court to the state court.—King v. State of West Virginia, U. S. S. C., 30 Sup Ct. 225.

35.——Municipal Ordinances.—A bill by a telephone company to restrain the enforcement of a municipal ordinance fixing rates, on the ground that such rates are confiscatory, presents a federal question and is within the jurisdiction of a federal court.—City of Owensboro v. Cumberland Telephone & Telegraph Co., U. C. C. C. of App., 174 Fed. 739.

36.——Rules of Decision.—Whether a deed of trust is valid or not is a local question, in the determination of which the federal courts will follow the decisions of the state court of last resort.—In re Elletson Co., U. S. D. C., N. D. W. Va., 174 Fed, 859.

37. **Damages**—Breach of Contract.—Where defendant breached a contract with plaintiff whereby plaintiff was to cut and manufacture lumber at a certain price, the measure of damages was the difference between the contract price and the cost of doing the work.—Ingham Lumber Co. v. Ingersoll & Co., Ark., 125 S. W. 139.

38.——Refusal of Buyer to Accept Goods.—On refusal of the buyer to accept a shipment of potatoes, the seller must dispose of them to the best possible advantage, so as to occasion the buyer the least possible damages.—Ziegler v. C. J. Gerlach & Bro., Tex., 125 S. W. 80.

39. **Death**—Foreign Statute.—Action for death authorized by statute of a foreign country where death was caused may be brought in this state.—Johnson v. Phoenix Bridge Co., N. Y., 90 N. E. 953.

40. **Deeds**—Estate Conveyed.—A clause in the habendum of a deed, that if a grantee died without bodily heirs the land should revert to the heirs of the grantor, which was in conflict with the granting clause, held void.—Hughes v. Hammond, Ky., 125 S. W. 144.

41.—Title of Grantor.—A grantee claiming land through a chain of title from the original grantee of a survey held to have a title from the sovereignty.—Pratt v. Townsend, Tex., 125 S. W. 111.

42. **Divorce**—Attorney's Fees. — Attorney's fees, incurred by the wife in a divorce suit, held recoverable from the husband if such costs were necessary.—Hill v. Hill, Tex., 125 S. W. 91.

43. **Dismissal**—Non-Suit.—Where parties are suing on a partnership claim, one of them may not dismiss the action against the objection of the other, unless the prosecution of the suit would result injuriously to him and if it might do so, the other partner may continue the action in the name of both upon indemnifying him against loss, if indemnity is demanded.—Ingham Lumber Co. v. Ingersoll & Co., Ark., 125 S. W. 139.

44. **Disturbance of Public Assemblage**—Elements of Offense.—There can be no conviction of disturbing a congregation upon proof of a disturbance after the minister had dismissed the congregation.—State v. Leonard, Mo., 125 S. W. 234.

45. **Dower**—Waiver.—A widow's consent to the sale of her husband's real estate, all of which is necessary to pay debts, without admeasurement of her dower, held a waiver of her dower rights.—Brown v. Brookhart, Iowa, 124 N. W. 882.

46. **Druggists**—Sale of Drugs.—The legislature's police power to conserve the public health includes the right to regulate and restrict the sale of drugs and medicines, whether poisonous or not.—State Board of Pharmacy v. Matthews, N. Y., 90 N. E. 966.

47. **Easements**—Creation—An assignable and inheritable right to use for profit the land of another may be created by a deed, and need not be reserved as appurtenant to other property.—Baker v. Kenney, Iowa, 124 N. W. 901.

48. **Elections**—Contest.—The statutory mode of contesting elections is a special proceeding, and the powers of the court in which the proceeding is brought, as well as the mode of procedure, must be determined by the statute alone.—Bradburn v. Wascoe County, Or., 106 Pac. 1018.

49. **Eminent Domain**—Compensation.—In proceedings by a city to condemn land for a street, the jury in determining whether any adjacent property is damaged held required to determine whether or not the remaining property is benefited.—City of Tacoma v. Wetherby, Wash., 124 N. W. 903.

50.——Measure of Compensation.—The measure of compensation for land taken for public use should be the same without reference to the purpose for which the property is taken.—Broadway Coal Mining Co. v. Smith, Ky., 125 S. W. 157.

51. **Equity**—Laches.—Where a person deposited money with another, to be repaid on actual demand, the owner was not chargeable with unreasonable delay in failing to demand payment before the other's death, which occurred 23 years after the deposit was made.—In re Fallon's estate, Minn., 124 N. W. 994.

52.——Protection Against Fraud.—Equity protects against fraud in all forms, but takes notice only of the basic wrongs accomplished through manipulations concealment and fraud, made possible by the disparity between the parties as to information, intelligence, and confidence, inspired by previous dealings and associations.—Yuster v. Keefe, Ind., 90 N. E. 920.

53. **Estoppel**—Pleading.—An estoppel arises from facts pleaded, though no fact is designated as such.—Carter v. Rinker, U. S. C. C., D. Kansas, 174 Fed. 882.

54. **Evidence**—Judicial Notice.—The court takes judicial notice that all men do not possess the same judgment as to distance.—George v. St. Louis & S. F. R. Co., Mo., 125 S. W. 196.

55.——Parol Evidence—Where the controversy is between a party to a written contract and one who is neither a party nor a privy to it, parol evidence tending to vary it is admissible.—Heisler Pumping Engine Co. v. Baum, Neb., 124 N. W. 916.

56. **Execution**—Persons Entitled.—One of several joint judgment debtors, who has paid the debt and taken an assignment of the judgment, cannot collect it from his co-debtors by execution.—Johnson v. Sherrod, Mo., 125 S. W. 212.

57. **Federal Courts**—Appellate Jurisdiction.—The appellate jurisdiction of the federal Supreme Court over state court cannot be based on denial of federal right not urged in the trial court, nor called to attention of state appellate court.—Cincinnati, N. O. & T. P. Ry. Co. v. Slade, U. S. S. C., 30 Sup. Ct. 236

58.——Jurisdiction.—In a transitory action in a federal court, as for a tort, the jurisdiction of the court is not affected by the fact that the cause of action arose in another state of which plaintiff is a citizen.—Lake Shore & M. S. Ry. Co. v. Eder, U. S. C. C. of App., Sixth Circuit, 174 Fed. 944.

59. **Frauds, Statute of**—Debt of Another.—An agreement of a purchaser of land to assume an incumbrance thereon is an agreement to answer for the debt of another within the statute of frauds, and is not valid unless in writing.—Parsons v. Kelso, Mo., 125 S. W. 227.

60.——License to Cut and Take Timber.—A license to cut and take from land within a specified time standing timber may be proved by parol, since such license conveys no interest in the land.—Baker v. Kenney, Iowa, 124 N. W. 901.

61.——Part Performance.—Where rent is paid in advance for the whole period of the lease, though more than a year, the lessee cannot be ejected until the expiration of the term, because the lease does not conform to the statute of frauds.—Koschnitzky v. Hammond Lumber Co., Wash., 106 Pac. 900.

62. **Good Will**—Transfer—The transfer of the good will of a business need not be under seal.—Myott v. Greer, Mass., 90 N. E. 895.

63. **Homestead**—Deed by Husband.—A husband's deed to the homestead, in which the wife does not join, conveys the title as against every one but the wife and those claiming under her.—Pullman v. City of Houston, Tex., 125 S. W. 69.

64. **Husband and Wife**—Contracts.—A wife executing a deed of land within the time required by the contract, signed by the husband alone, held to ratify the contract.—Heinemann v. Sullivan, Wash., 106 Pac. 911.

65.——Wife's Separate Estate.—A judgment for the wife, on granting her a divorce, for a specified amount as a division of the property, is her separate estate.—Kistler v. Kistler, Wis., 124 N. W. 1028.

66. **Indians**—Tribal Lands.—The United States retained the same power over land used for an Indian burying ground, excepted in Wyandotte Treaty Jan. 31, 1855, art. 2, from the cession of the lands of the tribe that it would have had if the tribe had continued in existence after the treaty.—Conley v. Garfield, U. S. S. C., 30 Sup. Ct. 224.

67. **Interest**—Money Payable on Demand.—Where a person deposited with her brother money, to be used by him for an indefinite time and to be paid upon demand, she was entitled to interest thereon.—In re Fallon's Estate, Minn., 124 N. W. 994.

68. **Interstate Commerce**—Shipping Liquor Into State for Personal Use.—A law prohibiting the shipping of intoxicating liquors lawfully purchased in another state into the state for the use of the purchaser for family held an interference with interstate commerce.—Alexander v. State, Okl., 106 Pac. 988.

69. **Intoxicating Liquors**—Local Option District.—It is not a violation of the local option law to go from a dry county into a wet county and purchase liquor, and bring it into the dry county for use as a beverage.—State v. Lynch, 90 N E. 935.

70.——License Tax.—Act Feb. 12, 1907 (Acts 1907, c. 4), imposing an occupation tax on persons handling liquors C. O. D., is valid as a police regulation of the handling of intoxicating liquors.—L. Craddock & Co. v. Wells-Fargo Company Express, Tex., 125 S. W. 59.

71.——Necessity for License.—As the state cannot surrender its police power, the issue of a corporate charter to a brewing company by the states does not authorize an unrestricted sale of its beer within the state.—Skelton v. State, Ind., 90 N. E. 897.

72.——Prescription by Physician.—A physician who was the owner of a drug store and a pharmacist, when charged with an illegal sale of liquor, cannot shield himself behind a sham prescription fraudulently fabricated for that purpose.—State v. Robertson, Mo., 125 S. W. 215.

73. **Judgment**—Full Faith and Credit.—The provision requiring full faith and credit to be given to the judicial proceedings of other states does not prevent injury into the jurisdiction of the court rendering a foreign judgment sued on.—Davis v. Davis, U. S. C. C. of App., Fourth Circuit, 174 Fed. 786.

74.——Opening or Vacating.—An attorney held under a legal and moral obligation to serve his client, and is under no obligation to the adverse party seeking by letter to employ him.—Weller v. Studebaker Bros. Mfg. Co., Ark., 125 S. W. 129.

75.——Scire Facias.—The writ of scire facias to revive a judgment at common law is not a new action, but a continuation of the old one.—Davis v. Davis, U. S. C. C. of App., Fourth Circuit, 174 Fed. 786.

76. **Larceny**—Lost Property.—A finder is not guilty of larceny of lost goods unless he has a felonious intent to appropriate them when found.—Brewer v. State, Ark., 125 S. W. 127.

77. **Libel and Slander**—Character.—Defendant in libel may, in defense and in mitigation of damages, prove plaintiff's bad character.—Lydiard v. Daily News Co. of Minneapolis, Minn., 124 N. W. 985.

78.——Publication by Agent.—Where a publication by an agent was not libelous, a ratification by the principal, did not make it so.—Harris v. Santa Fe Townsite Co., Tex., 125 S. W. 77.

79. **Life Estate**—Adverse Estate.—The possession of a life tenant is not adverse to the interest of the remainderman or reversioner.—Jacobs v. All Persons, etc., Cal., 106 Pac. 896.

80. **Limitation of Actions**—Flooding Lands.—Cause of action for injury to crops by railroad

embankment arises from the date of the injury, not from the date of the construction of the embankment.—Reed v. Chicago, B. & Q. R. Co., Neb., 124 N. W. 917.

81.——Persons Who May Rely on Limitations.—A gas company which was given the unclaimed balance of a fund impounded by the court, and which was to be returned to the consumers who paid it on condition that any claimants who afterward appeared should be paid their share, held not entitled to invoke the statute of limitations against their claims.—Northern Union Gas Co. v. Mayer, U. S. C. C. of App., Second Circuit, 174 Fed. 817.

82. **Master and Servant**—Assumed Risk.—An employee cannot be held to have assumed the risk of injury from a danger of which he did not know, while the master did, and which was not obvious.—Duluth Elevator Co. v. Wallin, U. S. C. C. of App., Eighth Circuit, 174 Fed. 955.

83.——Contributory Negligence.—The rule that where there are two ways of performing a dangerous duty it is the servant's duty to select the least dangerous one is subject to the exception that, if the conditions are such that the safer way cannot be used, the law permits the selection of the more dangerous one.—George v St Louis & S. F. R. Co., Mo., 125 S W. 196.

84.——Defective Appliances.—An employer's promise to repair a defective appliance need not be in express words, but may be implied from the words spoken or the employer's subsequent conduct.—Alkire v. Myers Lumber Co., Wash., 106 Pac. 915.

85. **Mortgages**—Deed as Mortgage.—In an action to have a deed declared a mortgage, where plaintiff was in possession, laches could not be imputed to him as long as it was not sought to interfere with his possession.—Brown v. Spradlin, Ky., 125 S. W. 150.

86. **Municipal Corporations**—Automobile Accidents.—Where an automobile and a person driving a team approach each other on a city street, both are bound to exercise ordinary care to avoid an accident or collision.—Webb v. Moore, Ky., 125 S. W. 152.

87.——Obstructions in Street.—If a city intrusts to a street contractor or subcontractor the duty to protect the public by barriers or otherwise against a temporary obstruction in the street, it becomes liable for their failure as it would be for its own.—Stoliker v City of Boston, Mass., 90 N. E. 927.

88.——Powers.—A municipal corporation has only such powers as are expressly granted, or fairly or necessarily implied from those granted, such as are essential, and not merely convenient, to the declared objects of the incorporation.—Brooks v. Incorporated Town of Brooklyn, Iowa, 124 N. W. 868.

89.——Validity of Incorporation.—The Incorporation of a village is not invalidated because land used for agricultural purposes, without blocks or streets, was improperly included.—Stout v. St. Louis, I. M. & S. Ry. Co., Mo., 125 S. W. 239.

90. **Names**—Change of Name.—At common law a person may change his name in good faith by merely adopting a new name, and holding himself out to his friends thereunder with their recognition.—Smith v. United States Casualty Co., N. Y., 90 N. E. 947.

91. **Navigable Waters**—Non-Tidal Stream.—A non-tidal stream, which was not meandered in the survey by the United States in 1823, is prima facie a non-navigable stream.—Blackman v. Mauldin, Ala., 51 So. 23.

92. **Negligence**—Automobiles.—An automobile is not such a dangerous machine as would require it to be put in the category with the locomotive, ferocious animals, dynamite, and other dangerous contrivances as respects the owner's liability for injuries therefrom.—Steffen v. McNaughton, Wis, 124 N. W. 1016.

93.——Want of Ordinary Care.—Want of ordinary care is negligence, but want of extraordinary care, or that which is customarily exercised by extraordinarily careful people, is slight negligence, and the latter does not affect the rights of parties injured.—Hackett v. Wisconsin Cent. Ry. Co., Wis., 124 N. W. 1018.

94. **Notice**—Mailing of Letter.—Proof of the mailing of a letter addressed to a firm and directed generally to "St. Louis, Missouri," containing no specific address or statement of the firm's business, is not sufficient to charge the firm with notice of its contests against their denial of any knowledge of it.—Chicago, R. I. & P. Ry. Co. v. Chickasha Nat. Bank, U. S. C. C. of App., Eighth Circuit, 174 Fed. 923.

95. **Parties**—Plaintiffs—Under common law procedure, where one of several owners of a joint interest refused to join as plaintiff, the other owners were permitted to use his name as a co-plaintiff.—Ingham Lumber Co. v. Ingersoll & Co., Ark., 125 S. W. 139.

96. **Partition**—Personal Property.—A co-tenant of personal property may have it partitioned, and such right is not subject to the control of another co-tenant.—Julian v. Yeoman, Okl., 106 Pac. 956.

97. **Payment**—Recovery of Money Paid.—Money paid under a mistake of fact may ordinarily be recovered back; the law, under such circumstances, raising an implied promise to refund.—James River Nat. Bank of Jamestown v. Weber, N. D., 124 N. W. 952.

98. **Pleading**—Separate Statement of Causes of Action.—Where plaintiff had three separate causes of action, and failed to state them separately, as required by Rev. Codes, sec. 6533, the proper remedy was to move to make the complaint more definite and certain.—Galvin v. O'Gormon, Mont., 106 Pac. 887.

99. **Principal and Agent**—Authority of Agent.—An agent to collect has no authority to receive anything but money, nor can he compound a debt or commute it for his own debt.—Zang v. Hubbard Building & Realty Co., Tex., 125 S. W. 85.

100.——Implied Authority.—A general agent for buying cotton held not to have implied authority to open an account in a bank in the name of his principals, where it was not necessary to his business of buying cotton.—Chicago, R. I. & P. Ry. Co. v. Chickasha Nat. Bank, U. S. C. C. of App., Eighth Circuit, 174 Fed. 923.

101. **Principal and Surety—Discharge** of Surety.—A surety guarantying the payment of rent held discharged from liability for the failure of the landlord to comply with the lease.—Berman v. Shelby, Ark., 125 S. W. 124.

102.——Discharge of Surety.—A surety is discharged by a valid agreement made without his consent, varying the original contract in any material particular, whether the change be to his benefit or prejudice.—Zang v. Hubbard Building & Realty Co., Tex., 125 S. W. 85.

103. **Railroads**—Injury to Person on Track.—

Where the engineer of the train exercised ordinary care to discover plaintiff while lying on the track, but failed to see him in time to avoid injury, the railroad company would not be responsible, though plaintiff was free from contributory negligence by reason of his want of mental capacity to appreciate his danger and avoid the same.—Epperson v. International & G. N. R. Co., Tex., 125 S. W. 117.

104.——Look and Listen.—If a traveler at a crossing fails to look and listen without a reasonable excuse, and such failure contributes to his injury, he cannot recover.—Crabtree v. Missouri Pac. R. Co., Neb., 124 N. W. 932.

105. **Removal of Causes**—Diversity of Citizenship.—An action of trespass to try title brought under the statutes of Texas, in which as permitted by Rev. St. Tex. 1895, art. 5255, several defendants each claiming title to the same tract are joined and answer, setting up their several claims, some of whom are citizens of the same state as plaintiff, is not removable by a non-resident defendant as involving a separable controversy between citizens of different states.—Lomax v. Foster Lumber Co., U. S. C. C. of App., Fifth Circuit, 174 Fed. 959.

106. **Replevin**—Articles on Person.—Even if articles on the person of defendant cannot be taken from his person on a writ of replevin, action for the article can be maintained.—Sibeck v. McTiernan, Ark., 125 S. W. 136.

107.——Demand.—An owner held entitled to replevin animals without a demand where the one seizing them under the damage feasant statute (St. 1898, sec. 1631 et seq.) fails to give notice of application for appraisers.—Goodrich v. Crabtree, Wis., 124 N. W. 1023.

108.——Pleading.—Where plaintiff in replevin relied on general allegations of ownership and right of possession, a general denial puts in issue both the right of property and the right of possession.—Hickey v. Breen, Mont., 106 Pac. 881.

109. **Sales**—Conditional Sales.—Under a conditional sale, a third person cannot acquire any interest from the buyer, without the seller's consent until the vesting of the title in the buyer.—Passow v. Emery, Utah, 106 Pac. 935.

110.——Severable Contracts.—Where shingles were sold in car load lots, and the buyer accepted two car loads, but refused to accept the third, the contract as to the three cars was severable, and the seller could sue for the price of the third.—Duluth Log Co. v. Hill Lumber Co., Minn., 124 N. W. 967.

111. **Specific Performance**—Defective Title.—A purchaser may be compelled to specifically perform his contract although at the date set for the transfer the title was defective, if the defect is subsequently remedied.—Pakas v. Clarke, 121 N. Y. Supp. 192.

112.——Right of Principal to Enforce.—A contract for the purchase of real estate, made through an agent in his own name, without stating the name of his principal, may be enforced by the principal in his own name.—Mitchell v. Knudtson Land Co., N. D., 124 N. W. 946.

113. **Statutes**—Effect of Repeal.—By the implied repeal of a statute by a later statute on the same subject, all acts or omissions in violation of the former statute are pardoned, and the penalties incurred thereunder are no longer enforceable.—State v. Texas & N. O. R. Co., Tex., 125 S. W. 53.

114. **Taxation**—Wrongful Possession of Real Property.—Property owners must pay taxes on their own property though it is in the wrongful possession of another.—Itzel v. Winn, Wis., 124 N. W. 1033.

115. **Trespass**—Burning House.—It does not matter as to liability of trespassers for burning an unoccupied house how careful they may have been in building a fire in the fireplace.—Wetzel v. Satterwhite, Tex., 125 S. W. 93.

116. **Trusts**—Character of Transaction.—The court will not assume that one person holds title to property in trust where the rights of the parties have been fixed by a specific written contract.—Gasaway v. Ballin, Wash., 106 Pac. 905.

117.——Constructive Trusts.—The element essential to create a constructive trust is that fraud, either actual or constructive, must have intervened, and such trusts are raised by courts of chancery only in cases where it becomes necessary to prevent a failure of justice, and in most cases the parties do not intend or agree to create such relation.—Yuster v. Keefe, Ind., 90 N. E. 920.

118. **Vendor and Purchaser**—Estoppel to Deny.—A vendor was not estopped to deny the execution of a contract to convey by the fact that she, after a suit had been started for specific performance tendered to the vendee a deed to the premises upon conditions different from those in the contract.—Fritz v. Mills, Cal., 106 Pac. 725.

119.——Offer and Acceptance.—An offer in specific terms, for the purchase of a tract of land made by letter or telegram, unconditionally accepted, becomes a binding contract.—Mitchell v. Knudston Land Co., N. D., 124 N. W. 946.

120.——Trespass to Personality.—Where the purchaser of timber knew that the vendor was only tenant by the curtsey so that he had no right to sell, the purchase of the timber, even when cut, made the purchaser a joint trespasser.—Kentucky Stave Co. v. Page, Ky., 125 S. W. 170.

121. **Waters and Water Courses**—Damages.—Damages paid to riparian owner for diversion of stream do not cover future injuries caused by defective construction of railroad embankment.—Reed v. Chicago, B. & Q. R. Co., Neb., 124 N. W. 917.

122.——Municipal Water Company.—A water company, having failed to comply with its contract with a city to furnish water for fire protection, held not liable in tort for damages sustained by property owner whose property was destroyed by fire.—German Alliance Ins. Co. v. Home Water Supply Co., U. S. C. C. of App., Fourth Circuit, 174 Fed. 764.

123. **Wills**—Construction.—The presumption that testator intended to dispose of his entire estate does not authorize disposition by the court of property not in fact disposed of.—Walters v. Neafus, Ky., 125 S. W. 167.

124.——Testamentary Instrument.—The delivery of a will conveys no estate to a devisee named therein.—Moody v. Macomber, Mich., 124 N. W. 549.

125.——Undue Influence.—In the absence of undue influence or want of mental capacity, it is immaterial what induced testator to change his will, reducing a bequest to a relative.—Haskins v. Stackhouse, Ky., 125 S. W. 179.